IN THE SUPREME COURT OF ZAMBIA **SCZ/8/20/2004**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

THE ATTORNEY-GENERAL Appellant

AND

CECIL DULU NUNDWE Respondent

Coram: Lewanika, DCJ, Chitengi, and Silomba, JJS.
on 21st June, 2006 and 3rd January, 2007

For the Appellants **:** Miss K. P. Mwananshiku - State Advocate

For the Respondent: Miss A. D. A. Theotis of
Messrs Theotis, Chalwe and Mataka

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to: -

1. ***Stanley Mwambazi V Morester Farms Limited (1977) ZR 108.***
2. ***Water Wills Limited V Wilson Samuel Jackson (1984) ZR 98.***
3. ***Nkhuwa V Lusaka Tyre Services Limited (1977) ZR 43.***

This is a Notice of Motion by the Applicant who is the Appellant in the appeal. The Notice of Motion is brought pursuant to Rule 48 of the Supreme Court Rules Supreme Court Act Chapter 25 of the Laws of Zambia.

The history of this Notice of Motion is that the Applicant appealed against a judgment of the High Court. After filing the Notice of Appeal on 24th February, 2004 the Appellant did not file the record of appeal within 60 days as provided for by the Rules. By 2nd November, 2004 when the

Respondent applied to have the appeal dismissed for want of prosecution, the Appellant had not yet filed the record of appeal. Clearly, the Applicants failure to file the record of appeal contravened Rule 54 of the Supreme Court Rules, which requires that the record of appeal should be filed within 60 days of filing the Notice of Appeal. In addition to this the Applicant did not even file the Notice of Appeal in time. The Applicant had to obtain leave to file Notice of Appeal out of time.

As a result of these delays on the part of the Appellant, the Respondent took out a summons before a single Judge to dismiss the appeal for want of prosecution. The single Judge held that the Appellant was guilty of inordinate delay and that the delay greatly prejudiced the Respondent.

The Appellant has now applied to the full court. The Affidavit in Support of the Motion reveals that the appellant is desirable to pursue the appeal. Counsel who has conduct of this appeal could not file the record of appeal within the stipulated period because she was out of the country pursuing further studies. While counsel was away instructions to file the record of appeal were not complete. There is merit in the appeal and the matter should be heard on merit instead of being dismissed on mere technicality.

Other than the Affidavit in Support of the application to dismiss the appeal for want of prosecution, the Respondent did not file another Affidavit. The substance of the Affidavits the respondent relied upon before the single Judge is that the Appellant was guilty of inordinate delay for failing to prosecute the appeal from 7th August, 2003 when the judgment appealed against was delivered up to the time, over a year later, when the Respondent took out a summons to dismiss the appeal for want of prosecution.

When we heard the Motion the State Advocate for the Appellant did not attend. Since there was no explanation for the failures by the State Advocate for the Appellant to attend the hearing we proceeded to hear the motion in the absence of the State Advocate for the Appellant.

Miss Theotis, learned counsel for the respondent, did not make any oral submissions but relied on her written heads of argument. The State Advocate had also filed written heads of argument on 13th September, 2005.

In her written heads of argument the State Advocate attacked the learned single Judge's holding that the delay was inordinate. She argued that matters should be heard on merit so that justice is done and that any default by a party can be compensated for by paying costs. As authority for this statement the State Advocate quoted the cases of ***Stanley Mwambazi V Morester Farms Limited***[1] ***and Water Wells Limited V Wilson Samuel Jackson***[2]. It was the State Advocate's submission that in this case the Appellant has an arguable defence in that the transfer to Mongu was fair in accordance with ***General Order No. 35*** which allows transfer of an officer to any station where his services are required.

In her written submissions Miss Theotis submitted that the learned single Judge was on firm ground when she held that the delay was inordinate. She argued that litigation must come to an end. On the delay Miss Theotis cited, inter alia, the case of ***Nkhuwa V Lusaka Tyre Services Limited***[3] where we said that Rules of Court should be strictly followed and that those who do not comply do so at their own risk. It was Miss Theotis' submission that in this case despite the fact that the judgment appealed against was delivered on 7th August, 2003 and the Appellant was granted leave to file Notice of Appeal out of time on 2nd October, 2003 and the Appellant actually filed the Notice of Appeal on 3rd

February, 2003, thereafter the Appellant did nothing to prosecute his appeal. Miss Theotis submitted that the delay was not only inordinate but was not reasonably explained. She said the explanation that the State advocate was out of the country on studies is not reasonable excuse for the delay because the State Advocate is not the only State Advocate in the Attorney General's Chambers.

Miss Theotis then referred us to Order 59/4//7 RSC 1999, which sets out the matters, which the court has to take into account when exercising its discretion to extend. These are: -

(a) The length of the delay.

(b) The reasons for the delay.

(c) The chances of the appeal succeeding if time for appealing is extended.

(d) The degree of prejudice to the Respondent if the application is granted.

It was Miss Theotis' submission that in this case there is no just cause for this Court to exercise its discretion in favour of the Appellant.

On the issue of good defence raised by the Appellant, Miss Theotis submitted that this is the first time the appellant is making mention of the defence they intend to rely upon. She pointed out that the learned single Judge had no basis to determine whether or not the Appellant had an arguable defence because it had not been presented to her.

We have carefully considered the Affidavit evidence that the parties rely upon, the submissions of counsel, the authorities cited and the judgment the learned single Judge who first heard and determined the application to dismiss the appeal for want of prosecution.

On the evidence we agree with the learned single Judge's holding and Miss Theotis' submissions that the Appellant was guilty of inordinate delay. The critical issue is whether, because of this inordinate delay, the Appellant should not be allowed to proceed with the prosecution of his appeal. We appreciate the force of Miss Theotis' submissions that the explanation given for the delay is not reasonable; that the State Advocate who has conduct of the appeal is not the only advocate in the Attorney-General's chambers for the prosecution of the appeal to await her return from overseas where she went for studies. But as we said in ***Mwambazi***[1] and many other subsequent cases the practice of this court is that matters should as much as possible be determined on merit. In this particular case, our view is that despite the delay complained of, the appeal should be determined on merit. However, this does not mean that we countenance the State Advocate's conduct in handling this appeal. Despite her previous defaults she could not even make an effort to attend the hearing of the Motion. In the circumstances the State Advocate must incur our censure.

For the reasons we have given we grant the Appellant an extension of time within which to file the record of appeal. The record of appeal should be filed within thirty (30) days from the date of this judgment and failing which the appeal shall stand dismissed for want of prosecution. Costs to the Respondent in any event, to be agreed upon and in default to be taxed.

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D. M. LEWANIKA
DEPUTY CHIEF JUSTICE

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PETER CHITENGI
SUPREME COURT JUDGE

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S. S. SILOMBA
SUPREME COURT JUDGE